

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK ANTHONY CANDLER,

Case No.: C 11-1992 CW (PR)

Plaintiff,

ORDER DENYING MOTION FOR
SUMMARY JUDGMENT WITHOUT
PREJUDICE, DENYING MOTION TO
COMPEL, SETTING DISCOVERY AND
BRIEFING SCHEDULES AND
DIRECTING ALL PARTIES TO
CONSENT OR DECLINE TO PROCEED
BEFORE MAGISTRATE JUDGE FOR ALL
FURTHER PROCEEDINGS

SANTA RITA COUNTY JAIL WATCH
COMMANDER, et al.,

Defendants.

(Docket nos. 12, 33)

Plaintiff, a state prisoner incarcerated at Pelican Bay State Prison, filed this pro se civil rights action pursuant to 42 U.S.C. § 1983, complaining about his conditions of confinement during the period of his incarceration as a pretrial detainee at the Santa Rita County Jail (SRCJ). Specifically, Plaintiff alleges (1) that from June 17, 2008 through December 13, 2010, Defendants held him in disciplinary lock-up without disciplinary charges or a hearing, and did not provide him with cleaning materials for his cell or with the requisite minimum of three hours of exercise a week, and (2) from March 2009 through December 2010, he routinely went for more than seventy-two hours without a shower. Plaintiff claims Defendants placed him in such adverse conditions of confinement not because of his conduct but, instead, in retaliation and at the request of the District Attorney. He claims the violation of his right to due process and that Defendants acted with deliberate indifference.

1 I. Summary Judgment

2 On October 5, 2012, Defendants filed a motion for summary
3 judgment. Thereafter, Plaintiff moved for a stay of further
4 proceedings because he was scheduled to be transferred to another
5 prison. On November 20, 2012, the Court denied the stay but
6 granted Plaintiff an extension of time to January 4, 2013, to
7 file his opposition to the motion for summary judgment. On
8 January 9, 2013, the Court received Plaintiff's opposition, in
9 which he wrote that he had been transferred to Pelican Bay State
10 Prison and had not yet received his legal property. He objected
11 to several alleged factually inaccurate statements made by
12 Defendants in support of their motion for summary judgment.

13 Defendants filed a reply and an objection to Plaintiff's
14 factual assertions, arguing that they are inadmissible hearsay
15 and improper opinion evidence. Plaintiff then filed a sur-reply
16 and a motion to compel discovery. Defendants opposed the motion
17 on the grounds that discovery has not yet opened in the case
18 because there has been no case management conference order,
19 Plaintiff has not made any formal discovery request and he has
20 not attempted to meet and confer. Plaintiff responded that he
21 sent Defendants requests for production of documents, to which
22 they did not respond.

23 In the order of service in this case, the Court wrote:
24 "Discovery may be taken in this action in accordance with the
25 Federal Rules of Civil Procedure. Leave of the Court pursuant to
26 Rule 30(a)(2) is hereby granted to Defendants to depose Plaintiff
27 and any other necessary witnesses confined in prison." Docket
28 no. 4 at 6:9-12. Consequently, no case management conference

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1 order is required and Plaintiff's discovery requests cannot be
2 objected to on that ground.

3 Rule 56(d) of the Federal Rules of Civil Procedure provides
4 a procedure by which a party may avoid summary judgment when such
5 party has not had sufficient opportunity to discover affirmative
6 evidence necessary to oppose the motion. See Garrett v. San
7 Francisco, 818 F. 2d 1515, 1518 (9th Cir. 1987). In particular,
8 Rule 56(d) provides that a court may deny a summary judgment
9 motion and permit the opposing party to conduct discovery where
10 it appears that the opposing party, in the absence of such
11 discovery, is unable to present facts essential to opposing the
12 motion. Fed. R. Civ. P. 56(d). A pending discovery motion is
13 sufficient to raise a question as to whether the party opposing
14 summary judgment should be permitted additional discovery, even
15 if no request under Rule 56(d) has been made. See Garrett, 818
16 F.2d at 1518.

17 The Ninth Circuit has made clear that in cases involving pro
18 se prisoners, summary judgment is not favored when discovery
19 requests for relevant evidence are pending. In particular, the
20 Ninth Circuit has noted:

21 Under Rule 56(f), the court may postpone
22 ruling on a summary judgment motion where the
23 nonmoving party needs "additional discovery to
24 explore 'facts essential to justify the party's
25 opposition.'" Crawford-El v. Britton, 523 U.S.
574, 599 n.20 (1998) (quoting Fed. R. Civ. Pro.
56(f)). Though the conduct of discovery is
generally left to a district court's discretion,
summary judgment is disfavored where relevant
evidence remains to be discovered, particularly in
cases involving confined pro se plaintiffs.
Klingele v. Eikenberry, 849 F.2d 409, 412 (9th
Cir. 1988); Harris v. Pate, 440 F.2d 315, 318 (7th

1 Cir. 1971) (Stevens, J.) (observing that the
2 combined disabilities of self-representation and
3 confinement hinder a plaintiff's ability to gather
4 evidence). Thus summary judgment in the face of
5 requests for additional discovery is appropriate
6 only where such discovery would be "fruitless"
7 with respect to the proof of a viable claim.
8

9 Klingele, 849 F.2d at 412.

10 Jones v. Blanas, 393 F.3d 918, 930 (9th Cir. 2004) (parallel
11 citations omitted).

12 Here, Defendants have filed a motion for summary judgment
13 and have objected to Plaintiff's evidence in opposition thereto
14 as inadmissible hearsay and improper opinion evidence. The
15 parties, however, have not conducted any discovery; consequently,
16 Plaintiff has not been able to obtain evidence from Defendants
17 that may be relevant to opposing their motion and proving his
18 claims. Under such circumstances, the Court finds it proper to
19 allow Plaintiff to conduct discovery before opposing Defendants'
20 motion for summary judgment.¹

21 ¹ Plaintiff is advised that a district court may consider
22 only admissible evidence in ruling on a motion for summary
23 judgment. See Fed. R. Civ. P. 56(c); Orr v. Bank of America, 285
24 F.3d 764, 773 (9th Cir. 2002). Such evidence may include a sworn
25 affidavit or declaration that is made on personal knowledge, sets
26 out facts that would be admissible in evidence, and shows that
27 the affiant or declarant is competent to testify on the matters
28 stated. Fed. R. Civ. P. 56(c)(4). A verified complaint may be
used as an opposing affidavit under Rule 56, as long as it is
based on personal knowledge and sets forth specific facts
admissible in evidence. See Schroeder v. McDonald, 55 F.3d 454,
460 & nn.10-11 (9th Cir. 1995) (treating plaintiff's verified
complaint as opposing affidavit where, even though verification
not in conformity with 28 U.S.C. § 1746, plaintiff stated under
penalty of perjury that contents were true and correct, and
allegations were not based purely on his belief but on his
personal knowledge); see also Keenan v. Hall, 83 F.3d 1083, 1090
n.1 (9th Cir. 1996), amended, 135 F.3d 1318 (9th Cir. 1998)
(treating allegations in prisoner's verified amended complaint as
opposing affidavit).

1 Accordingly, Defendants' motion for summary judgment is
2 DENIED without prejudice to them filing a renewed motion for
3 summary judgment after the parties have conducted discovery.
4 See Fed. R. Civ. P. 56(d)(1). Plaintiff's motion to compel is
5 DENIED without prejudice as premature.²

6 The parties shall comply with the discovery and briefing
7 schedules set forth in the Conclusion of this Order.

8 II. Consent or Declination to Proceed Before Magistrate Judge

In order to encourage the just, speedy and inexpensive determination of 42 U.S.C. § 1983 cases filed in this district, the parties may waive their right to proceed before a district judge and consent to proceed before a magistrate judge for all purposes. Attached to this Order is a Notice of Option to Consent to Proceed Before United States Magistrate Judge and an Order requiring the parties to notify the Court whether they consent or decline to so proceeding. The parties shall complete the requisite consent or declination form and return it to the Court no later than fourteen days from the date of this Order.

CONCLUSION

For the reasons stated above, the Court orders as follows:

21 1. Defendants' motion for summary judgment is DENIED
without prejudice. Docket no. 12.

23 ² The district court generally is not involved in the
24 discovery process and only becomes involved when there is a
25 dispute between the parties about discovery responses, which
26 normally are exchanged between the parties without any copy sent
27 to the court. See Fed. R. Civ. P. 5(d). Before filing any
28 motion to compel discovery, the parties must make a good faith
effort to meet and confer to attempt to resolve any discovery
dispute, as is required by Civil Local Rule 37-1. When a party
is incarcerated, the parties may meet and confer via written
communication.

2. Plaintiff's motion to compel discovery is DENIED without prejudice. Docket no. 33.

3. No later than fourteen days from the date of this Order, all parties shall file their consent or declination to proceed before a United States Magistrate Judge.

4. The parties shall abide by the following discovery and briefing schedules:

a. No later than August 1, 2013, the parties shall complete all discovery.

b. No later than August 15, 2013, the parties shall file all discovery-related motions.

c. No later than September 1, 2013, Defendants shall file their motion for summary judgment.

d. No later than September 30, 2013, Plaintiff shall file his opposition to Defendants' motion.

e. No later than October 15, 2013, Defendants shall file their reply to the opposition.

5. No extensions of time with respect to the above deadlines will be granted absent compelling circumstances.

This Order terminates Docket nos. 12 and 33.

IT IS SO ORDERED.

Dated: 5/13/2013


CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE